No. 17-1351

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland, Southern Division
(8:17-cv-00361-TDC)

BRIEF FOR APPELLEES

Justin B. Cox
NATIONAL IMMIGRATION LAW CENTER
1989 College Ave. NE
Atlanta, GA 30317
Tel: (678) 279-5441
Fax: (213) 639-3911
cox@nilc.org

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
Marielena Hincapié
NATIONAL IMMIGRATION LAW CENTER

Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
Spencer E. Amdur
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org

Cecillia D. Wang
Cody H. Wofsy
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

3435 Wilshire Boulevard, Ste. 1600
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org

39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org

David Cole
Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
915 15th Street NW
Washington, DC 20005
Tel: (202) 675-2330
Fax: (202) 457-0805
dcole@aclu.org

David Rocah
Deborah A. Jeon
Sonia Kumar
Nicholas Taichi Steiner
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
rocah@aclu-md.org

Counsel for Plaintiffs-Appellees

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INTRODUCTION

The facts of this case are extraordinary. President Trump publicly committed himself to an indefensible goal: banning Muslims from coming to the United States. The President refused to repudiate that goal on multiple occasions, including after he was elected, and he continues to advertise it to this day on his own website. The President also explained how he would implement his impermissible goal: Because people objected when he used "the word Muslim," he announced, he would instead be "talking territory, not Muslim." He followed through on this promise in an Executive Order signed one week after inauguration, and prepared with no input from the relevant federal agencies.

After that order was blocked by the courts, President Trump issued a revised Order—the one at issue here—that embodied the same core policy, with what his senior advisor called "mostly minor technical differences" designed to improve its chances in litigation. Those differences included a thin veneer of national security recitations, added post hoc and in any event contradicted by the government's own internal reports and by the analysis of a bipartisan group of national security officials. The revisions also eliminated some—but not all—of the facial indications of its anti-Muslim purpose and message. As the President himself acknowledged, the second Order was just a "watered down version of the first."

The government has never contested that the extraordinary record in this case, taken in full, establishes that the President adopted the Order with the primary purpose of targeting Muslims. Nor has it ever argued that the government *could* ban people because of their religion consistent with the commands of the Establishment Clause. Rather, the government urges this Court to look away. It argues that plaintiffs subject to the Order who are injured by its condemnation of their religion do not have standing to challenge it. And it contends that courts must blind themselves to the ample, public, and uncontested evidence of improper purpose—even in the President's post-election statements—and instead accept, without question, whatever the government said its purpose was in the revised Order.

What the government seeks here is judicial abdication—not deference. In fact, it is the plaintiffs who are taking the President at his word, and the government that asks the Court to erase him from the record. The government's highly artificial approach cannot be squared with precedent or the critical role of the judiciary in enforcing fundamental constitutional limits in the face of executive overreach. Adopting it in order to resolve this highly unusual case in the government's favor would do serious long-term damage to our constitutional order. The Court should decline that invitation, and instead uphold the district court's preliminary injunction of this unprecedented and impermissible ban.

STATEMENT OF THE CASE

A. Presidential Statements on Preventing Muslim Immigration

Both before and after assuming office, President Trump has made his plans for Muslim immigration unmistakable. Throughout his presidency, his continually-updated website has called explicitly for "preventing Muslim immigration." J.A. 346. It asserts that "there is great hatred towards Americans by large segments of the Muslim population." *Id.* While President Trump first made this statement on the campaign trail, the website on which he publishes it—donaldjtrump.com—explains on its main page that his "[c]ampaign cannot stop now—our Movement is just getting started."

The statements on the President's website echo a promise he has reiterated many times. During the campaign, he repeatedly called for a "shutdown of Muslims entering the United States," J.A. 346, 378, on the rationale that "Islam hates us." J.A. 516. He claimed that Muslim immigrants represent an "extraordinary influx of hatred & danger coming into our country." J.A. 470. After the election, President-elect Trump was asked if he still planned to implement some form of a Muslim ban. He responded, "You know my plans. All along, I've proven to be right. 100% correct." J.A. 506.

President Trump never disavowed his intention to prevent Muslim immigration. Instead, he announced that he would achieve that goal by banning individuals from Muslim countries rather than instituting a direct religious test. In one interview, he explained that "[p]eople were so upset when I used the word Muslim," and so he would now be "talking territory instead of Muslim." J.A. 481. In another, he responded to criticism of his proposed Muslim ban by saying, "So you call it territories. Ok? We're gonna do territories." J.A. 798. Indeed, the day after the first order was issued, a Presidential advisor was asked, "[h]ow did the President decide the seven [banned] countries?" J.A. 508. He explained that President Trump had approached him to help design a Muslim ban, and to "[s]how [him] the right way to do it legally." *Id*. In response, the advisor recommended to President Trump that the Muslim ban operate on the basis of nationality. J.A. 508-09.

B. The Original Executive Order

On January 27, 2017, seven days after taking office, President Trump issued the original Executive Order, which banned entry into the United States for 90 days by nationals of seven countries whose populations range from 87 to 99 percent Muslim. Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 ("Jan. 27 Order") § 3(c); J.A. 451-59. The Order also suspended the U.S. Refugee Assistance Program for 120 days, lowered the annual number of refugee admissions for fiscal year 2017 from 110,000 to 50,000, and banned Syrian refugees indefinitely. Jan. 27 Order § 5(a), (c)-(d). President

Trump did not consult the Department of Homeland Security, Department of Justice, or Department of State in developing the Order. J.A. 725-26, 804. At the signing ceremony, President Trump read the title, "Protect[ing] the Nation from Foreign Terrorist Entry into the United States," and then said, "We all know what that means." J.A. 403, 778.

The January 27 Order targeted Islam in other ways beyond barring entry. It directed the Secretary of State to "prioritize refugee claims made by" members of "a minority religion in the individual's country of nationality," Jan. 27 Order § 5(b), (e)—a provision the President announced was necessary because "[i]f you were a Muslim you could come in, but if you were a Christian, it was almost impossible," J.A. 462. The Order also directed the Secretary of Homeland Security to collect data on "honor killings[] in the United States by foreign nationals," Jan. 27 Order § 10(a)(iii); *see id.* § 1—referring to a stereotype about Muslims that the President had invoked in the months preceding the Order, J.A. 598; *see also* J.A. 681 (Breitbart describing "honor killing" as a specifically Muslim practice).

The January 27 Order blocked entry even by legal permanent residents, who do not need visas to enter the United States. Jan. 27 Order § 3(c); 8 C.F.R. § 211.1. It also barred nationals of the seven banned countries who had already been issued visas. After President Trump signed the Order, the State Department began cancelling tens of thousands of already-issued visas. J.A. 774.

The January 27 Order went into effect immediately, creating chaos across the country. Travelers were detained at airports, families were separated, patients were blocked from treatment, and refugees were stranded in harm's way. The next day, a district court in New York issued a nationwide stay of deportations under the Order. *See Darweesh v. Trump*, No. 17-cv-480, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017). Other district courts soon enjoined significant portions of the Order. *See Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855, at *8-9 (E.D. Va. Feb. 13, 2017) (holding that the Order likely violated the Establishment Clause); *Washington v. Trump*, No. 17-cv-141, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (enjoining the Order nationwide).

After the Ninth Circuit Court of Appeals declined to stay the *Washington* injunction, *see Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), the government announced that the President intended to revise and re-issue the Order.

C. The Revised Executive Order

In the weeks leading up to the revised Order, the President and his closest advisors assured the public that the new version would achieve the same goals as the original. President Trump announced that "we can tailor the order to [the Ninth Circuit] decision and get just about everything, in some ways, more." J.A. 370.

White House Press Secretary Sean Spicer affirmed that "[t]he principles of the executive order remain the same." J.A. 379. And senior advisor to the President Stephen Miller echoed that the revised Order would contain "mostly minor technical differences" and achieve "the same basic policy outcome for this country." J.A. 579.

Indeed, the revised Order, which President Trump signed on March 6, 2017, was simply a "watered down version" of the original, as the President himself later explained.[1] 82 Fed. Reg. 13209 ("Mar. 6 Order" or "the Order"). Its title was identical. It banned individuals from six of the original seven Muslim countries for 90 days, Mar. 6 Order § 2(c),[2] it shut down the refugee program for 120 days, *id.* § 6(a), and it again reduced the annual number of refugees from 110,000 to 50,000, *id.* § 6(b). It continued to instruct the Secretary of Homeland Security to track "honor killings." *Id.* § 11(a)(iii). And, like the original, the revised Order established procedures for making its bans permanent. Mar. 6 Order §§ 2(b), (e),

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[1] Katie Reilly, Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak', Time, Mar. 16, 2017, http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/.

[2] Both versions cited a statute concerning exceptions to the Visa Waiver program as the source for the seven-country list. As *amici* former national security officials have explained, the history, goals, and effect of that statute are dramatically different from those of the Order, and the inclusion of the seven countries on the Visa Waiver Program exceptions list "provide[s] no justification for" banning their nationals. Dkt. No. 126-1, at 11-13.

(f). The government's brief repeatedly asserts that the President consulted his cabinet in issuing the revised Order, Br. 1, 3, 8, 9, 30, 38, 51, but the government has conceded the President chose the 90- and 120-day ban policies without any agency consultation when he created the January 27 Order. J.A. 725-26.[3]

The revised Order cited the same rationale as the first: facilitating a review of visa-issuance and refugee admissions procedures. Mar. 6 Order § 1(a). Although the time for completing that review under the original Order had already passed (and the review provisions were not enjoined), the revised Order reset the clock, initiating new 90- and 120-day bans. *Id.* § 2(c), 6(a). The government has explained that its process for revising the Order included "compil[ing] additional factual support" for its (already-decided) policy, Stay Reply at 3; accordingly, the revised Order recited new national security explanations that the government had not offered the first time around.[4] The Order also acknowledged that it had been

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3 In particular, the government cites a letter to the President from the Attorney General and Secretary of Homeland Security. Br. 8 & n.3. The letter is dated the same day the President issued the revised Order. It does not state that those officials (or their departments) participated in revising the Order. Notably, no official from the Department of State, which vets and issues visas, signed the letter. *Cf.* Br. at 48 (asserting, without citation, that the Order "reflects the considered views of the Secretary of State. . . .").").

4 For the choice of the six countries, those explanations consisted of excerpts from a set of 2015 State Department country condition reports on terrorism, Order § 1(e), and a description of one individual case, in which a Somali refugee, who

revised in order to have a better chance of withstanding litigation. Mar. 6 Order § 1(c), (h)(i).

Shortly before the President signed the revised Order, two internal DHS reports were released to the public. Unlike the recycled and excerpted 2015 State Department report cited in the revised Order, the internal DHS reports were specifically prepared to evaluate whether there was a national security justification for the first Order's ban. One report concluded that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." J.A. 419. The other, written by the DHS Office of Intelligence and Analysis in coordination with the Department of State, the National Counterterrorism Center, Customs and Border Protection, and various other DHS sub-agencies, concluded that increased vetting was unlikely to significantly reduce the incidence of terrorism in the United States. J.A. 426; *see also* J.A. 779 (describing joint affidavit by recent national security and intelligence officials reaching the same conclusion); Amicus Br. of Former National Security Officials, Dkt. No. 126-1, at 3-13; Amicus Br. of Interfaith Coalition, Dkt. No. 47-1, at 11-24 (explaining mismatch between country conditions reports and the six-country list); J.A. 411 (Secretary of Homeland

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entered the United States as a toddler, was convicted of a terrorist plot more than a decade and a half later, *id.* § 1(h); J.A. 547, 553.

Security admitting there are "13 or 14" other countries, "not all of them Muslim," that have questionable vetting procedures).

The revised Order did not apply to the groups that were the primary focus of the Ninth Circuit's due process analysis: permanent residents and holders of existing visas. Mar. 6 Order § 3(a)(iii), (b); *see also Washington*, 847 F.3d at 1165. Thus, under the revised Order, significant numbers of individuals from the banned countries who were screened and vetted pre-Order will be able to enter the United States. The revised Order eliminated the express minority-religion preference and indefinite Syrian refugee ban (though Syrians remained subject to the more general nationality and refugee bans). It also added to the original Order's waiver provision a list of illustrative scenarios where waivers might be appropriate. Mar. 6 Order § 3(c).

D. Proceedings Below

The plaintiffs filed this lawsuit in the District of Maryland on February 7, 2017, challenging the original Order. J.A. 22. After the President issued the revised Order, the plaintiffs amended their Complaint. J.A. 205-61.

The plaintiffs in this case are individuals and organizations who are directly affected by the March 6 Order in a variety of ways. The individual Muslim plaintiffs are immigrants seeking to unite with family members who are subject to the Order's ban. They have experienced isolation, exclusion, fear, anxiety, and insecurity because of the "anti-Muslim attitudes" conveyed by the Executive Order, along with the President's accompanying statements "about banning Muslims from entering" the country. J.A. 306, 310, 786.

The Order has also caused them additional harms. Plaintiffs John Doe #1 and #3 are Muslim lawful permanent residents ("LPRs") from Iran with pending petitions for visas to be reunited with their Iranian wives. J.A. 304-06, 308-10. Plaintiff Ibrahim Mohomed is a Muslim U.S. citizen who has been separated for two years from his Somali wife and children, who are living in refugee housing in Ethiopia, where they cannot go to school. J.A. 321-22. Plaintiff Jane Doe #2 is a Muslim U.S. citizen petitioning to be reunited with her Syrian sister, who is living in deplorable conditions in Saudi Arabia. J.A. 316-19.

The organizational plaintiffs serve numerous Muslim immigrants who are harmed by the Order. The International Refugee Assistance Project ("IRAP") provides legal representation to vulnerable populations, particularly those from the Middle East, who seek to find safety and reunite with their families in the United States and elsewhere. J.A. 263. IRAP's clients, most of whom are Muslim, include individuals in the United States seeking to be reunited with loved ones from the six banned countries. J.A. 263, 270. IRAP has been compelled to divert significant resources as a result of the Executive Orders. J.A. 267.

Plaintiff HIAS, the oldest refugee assistance organization in the world, is one of nine organizations that have unique responsibilities for resettling refugees under the government's Refugee Assistance Program. It has hundreds of Muslim clients, including individuals in the United States seeking to be reunited with family members from the six banned countries, many of whom face ongoing persecution abroad. J.A. 273, 283. The organization has also experienced direct financial injuries as a result of the Orders preventing its clients and their family members from being resettled here. J.A. 280-81.

Plaintiff Middle East Studies Association ("MESA") is a membership organization of students and scholars of Middle Eastern studies. The ban has inflicted financial injury on MESA and has frustrated its mission of fostering study and public understanding of the Middle East. J.A. 300-03. MESA's members are also harmed by the ban, including its members who seek to work with individuals from the banned countries. J.A. 299-300.

E. The District Court's Preliminary Injunction

On March 16, the district court granted in part the plaintiffs' motion for a preliminary injunction, issuing a nationwide preliminary injunction of Section 2(c) of the Order. In a careful opinion that thoroughly surveyed the facts and the law, the court held that the plaintiffs had standing and were likely to succeed on their claims that Section 2(c) violates the Establishment Clause and the anti-discrimination mandate of the Immigration and Nationality Act ("INA").

This appeal followed.

SUMMARY OF ARGUMENT

I. The district court correctly found that multiple plaintiffs have standing to raise their Establishment Clause and statutory claims. Unrebutted evidence in the record demonstrates that the Order has caused plaintiffs to experience official condemnation of their religion and exclusion from the broader community; that they are directly targeted by the hostile religious message embodied in the Order; and that their pending visa petitions are subject to the Order's terms. Their Establishment Clause claims are plainly justiciable.

Plaintiffs' statutory claims are also justiciable, as the district court correctly found. While plaintiffs' relatives have not yet been denied visas under the Order, multiple plaintiffs are far enough along in the visa application process that, absent an injunction, delays or denials are virtually inevitable. The Order also forces them to contend with a waiver process that would not otherwise exist.

II. The district court correctly found that the plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The extraordinary factual record in this case contains extensive, unrebutted evidence that would lead a reasonable observer to conclude that President Trump enacted the ban primarily for the purpose of targeting Muslims who seek to enter the United States. As the district court also correctly found, the Executive Orders themselves, the history of their enactment, and the evidence in the record demonstrate that any national security purpose was secondary to the improper purpose.

The government responds with a set of propositions that would each gut the Establishment Clause. The core argument is that because the Order itself does not state that it is designed to disfavor Muslims, but instead is "expressly premised . . . on national security," the Court should blindly accept that stated purpose and conclude that the Order is constitutional.

The government argues that this approach is either required by *Kleindienst v. Mandel*, 408 U.S. 753 (1972),), or necessary because evidence other than the Order itself is insufficiently "official" to be taken into account by the courts. Neither proposition is correct. *Mandel* does not govern the plaintiffs' Establishment Clause claim, and even if it did, the review it envisions is not the meaningless exercise to which the government seeks to confine the courts. Nor does any precedent support the government's request that the courts turn a blind eye to evidence of improper purpose. In fact, precedent and reason demand exactly the opposite.

The plaintiffs are also likely to succeed on their statutory claims. Neither § 1182(f) nor § 1185(a) authorizes § 2(c)Section 2(c) of the Order, especially in light of the explicit bar on national-origin discrimination in § 1152(a)(1)(A), the fact that the government's broad reading of § 1182(f) and § 1185(a) would give the President unilateral authority to rewrite large portions of the INA, the lack of anything suggesting that these provisions were meant to enable religious discrimination, and the principle of constitutional avoidance.

III. The district court correctly balanced the harms in deciding to issue a preliminary injunction. The individual and organizational plaintiffs are harmed in myriad concrete ways by Section 2(c) of the Order. The government asserts abstract institutional injuries that do not amount to irreparable injury at all, much less an injury that could outweigh the harms the Order inflicts on the plaintiffs. Moreover, the public interest favors enjoining an unconstitutional order.

IV. The district court appropriately determined the scope of its preliminary injunction in light of the parties and evidence before it. The individual plaintiffs and the clients and members of the organizational plaintiffs are dispersed throughout the United States. Moreover, the Establishment Clause injuries of the plaintiffs would persist if Section 2(c) were merely narrowed in scope. The nationwide preliminary injunction is necessary to protect them from harm. The national interest in uniformity in immigration-related matters, along with the practical concerns that any narrower injunction would raise, further support the district court's decision to enter a nationwide preliminary injunction.

ARGUMENT

I. The Plaintiffs' Claims Are Justiciable

The government seeks to set up a series of roadblocks to the Court's resolution of the merits of this case, asserting, with varying degrees of specificity, arguments based on standing, ripeness, and consular non-reviewability. But the dispute in this case is all too concrete and imminent for the plaintiffs, who are singled out for condemnation and separated from their loved ones by the Order.

A. The Plaintiffs Have Standing to Raise Their Establishment Clause Claims

For the Muslim plaintiffs in this case, and for the Muslim clients and members of the organizational plaintiffs, the Order is "a daily experience of contact with a government that officially condemns [their] religion." *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1052 n.33 (9th Cir. 2010) (en banc). The anti-Muslim message embodied by the Order singles them out for particular condemnation and stigma because they are Muslim immigrants. And the anti-Muslim policy the Order establishes affects them and their relatives directly. The exclusion and condemnation this visits on the plaintiffs is well documented in the record and the district court's findings.

The plaintiffs plainly have standing to object to the condemnation of their own religion in their own community through an Order that has painfully injected itself into their lives. The injury and targeting of the plaintiffs here goes far "beyond the 'personal and unwelcome contact' that suffices for standing" under the Establishment Clause. *Awad v. Ziriax*, 670 F.3d 1111, 1122 (10th Cir. 2012) (citation omitted). The government's suggestion that the plaintiffs lack standing is wrong.

1. "[T]he standing inquiry in Establishment Clause cases has been tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer." *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); *see id.* at 1086-87 (explaining that "noneconomic or intangible" harms are sufficient, and holding that plaintiff who alleged "distress" had standing). "Feelings of marginalization and exclusion are cognizable forms of injury, particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they are *outsiders*, not full members of the political community.'" *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (quoting *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005)) (emphasis in original); *Catholic League*, 624 F.3d at 1052 (plaintiffs had standing to challenge a purely expressive resolution based on its allegedly anti-Catholic message); *Awad*, 670 F.3d at 1120-22 (plaintiff had standing to challenge state constitutional amendment based on its anti-Muslim message before it was clear it would have any practical effect).

The government's attempt to dismiss the plaintiffs' Establishment Clause injuries by labeling them "stress," Br. 23, disregards these basic Establishment Clause principles. The district court correctly found that plaintiffs have suffered injuries that establish standing in this context. J.A. 785-86. Plaintiff John Doe #1, for example, has experienced "fear, anxiety, and insecurity" because of the Order. J.A. 306. As he explained, "the statements that have been made about banning Muslims from entering, and the broader context" of the Order express "anti-Muslim views" that engender the feeling that "I may not be safe in this country." *Id*. Similarly, the "anti-Muslim attitudes that are driving" the Order have made Plaintiff John Doe #3 "question whether I even belong in this country despite everything I have sacrificed and invested in making a life here." J.A. 310. That anti-Muslim sentiment has likewise left him afraid that "anything I do will be regarded with suspicion." *Id*.; *see also* J.A. 314 (plaintiff Meteab explaining: "Because of the Executive Order and official anti-Muslim sentiment motivating it, I have felt isolated and disparaged in my community.").[5]

The organizational plaintiffs' clients and members have suffered the same kinds of injuries. The Order "marginalize[s] IRAP's Muslim clients and subject[s] them to suspicion, scrutiny, and social isolation on account of their religious beliefs," leaving clients within the United States afraid and feeling that "they are not welcome" in this country. J.A. 269-70. The "Executive Order has taken a particular toll on" HIAS's many Muslim clients within the United States "because of its anti-Muslim motivation and message," leaving them "marginalized in their communities as a result." J.A. 286-87. Likewise, "many Muslim members" of MESA "understand the message" of the Order "to be an attack on Islam" that "marginalize[s] them," leaving them afraid they will be "singled out . . . because of the anti-Muslim message." J.A. 300.[6]

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[5] The district court did not analyze the other plaintiffs' standing because a single plaintiff with standing renders a claim justiciable. J.A. 781, 787.

In short, the plaintiffs invoke their rights to be free from government condemnation of their religion within the United States. The government's extraterritoriality citations are thus irrelevant, Br. 22-23, as are circuit cases involving no such injury, *see Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641

[6] IRAP and HIAS also have third-party standing to assert the rights of their clients. *See Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (third-party standing requires "close relationship with the person who possesses the right," as well as "a hindrance to the possessor's ability to protect his own interests") (citation and quotation marks omitted); *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 730-33 (S.D. Ind. 2016) (refugee resettlement agency had third-party standing to assert equal protection rights of its clients who wished to avoid drawing attention to themselves), *aff'd*, 838 F.3d 902 (7th Cir. 2016) (Posner, J.); J.A. 270-71, 284-87 (describing significant practical obstacles to clients' ability to protect their own interests, including language and cultural barriers and reasonable concerns regarding public and governmental scrutiny). MESA has standing to assert the rights of its members. *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996).

F.3d 197, 207 (6th Cir. 2011) (en banc) (cited in Stay Reply Br. 5, 7) (no condemnation injury); *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008) (no condemnation injury, plaintiffs alleged only "abstract offense" at discriminatory practices).[7]

2. The government's suggestion that the plaintiffs in this case are like those who lacked standing in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), is incorrect. *Valley Forge* was a suit brought by plaintiffs residing in Maryland and Virginia challenging a transfer of property in Pennsylvania, which the plaintiffs learned about from a press release. *Id.* at 484. While the Court reaffirmed "that standing may be predicated on noneconomic injury," the plaintiffs "claim[ed] nothing" in the way of injury besides the constitutional violation itself, and the Court held that "observation of conduct with which one disagrees" and the resulting "psychological consequence" of that disagreement were, standing alone, insufficient. *Id.* at 485-86. As this Court has explained, the "[p]laintiffs were denied standing in *Valley Forge* because they had *absolutely no personal contact*

[7] The cases interpreting other constitutional provisions cited by the government are not relevant to the plaintiffs' Establishment Clause claim. *Compare* Br. 21, 24 (citing *Allen v. Wright*, 468 U.S. 737 (1984)) *with Awad*, 670 F.3d at 1123 n.8 (explaining that *Allen* involved a generalized claim outside the Establishment Clause context).

with the alleged establishment of religion." *Suhre*, 131 F.3d at 1086 (emphasis added).

This case is far removed from the abstract harm rejected in *Valley Forge*: The Order was imposed by the government directly on the Muslim plaintiffs' own community, condemns them in particular, threatens to divide them from close family members, and has caused meaningful stigmatic and other injuries.

First, the Muslim plaintiffs (and the organizational plaintiffs' Muslim clients and members) did not "roam the country in search of governmental wrongdoing." *Valley Forge*, 454 U.S. at 487. The Order subjects them to its anti-Muslim message in their own community. *See Suhre*, 131 F.3d at 1087 ("[T]he practices of our own community may create a larger psychological wound than someplace we are just passing through.") (internal quotation marks omitted); *Awad*, 670 F.3d at 1122 (plaintiff had standing to challenge state constitutional amendment "[a]s a Muslim and citizen of Oklahoma"); *Catholic League*, 624 F.3d at 1048 (noting that Catholics in San Francisco had standing although a Protestant in Pasadena would not have).

Second, the individual Muslim plaintiffs are within the group particularly singled out by the Order's message of condemnation: foreign-born Muslims. *See, e.g.*, J.A. 304-05, 308, 310, 312-13, 321. The same is true of many of IRAP's clients, J.A. 263, HIAS's clients, J.A. 273, 286-87, and MESA's members, J.A.

298-300.[8] As this Court's decision in *Moss*, cited in Br. 22-23, makes clear, the "targets" of "religious intolerance" have standing under the Establishment Clause. In *Moss*, two families challenged a public school's policy of accepting credits from certain independent religious schools. 683 F.3d at 602-04. The Tillets lacked standing because the family (1) did not receive a Christian school's letter promoting its bible studies course as eligible for credits under that policy, and (2) as Christians were not the "targets or victims of this alleged religious intolerance." *Id*. at 606. But—in a portion of the opinion the government ignores—the Court held the Mosses *did* have standing because they (1) received the letter and (2) were non-Christians. *Id*. at 607. It was sufficient that they experienced the letter, which was not even from a government entity, as "part of a broader pattern of Christian favoritism" which "made them feel like 'outsiders' in their own community." *Id*. Here, the message is one of condemnation (not promotion of another religion) and

[8] Moreover, each of the organizational plaintiffs would be injured in concrete ways in their own right by Section 2(c). The record, for example, demonstrates that MESA stands to lose some $18,000 in registration fees because of the Order, plus a number of dues-paying members. J.A. 301-03; *see also, e.g.*, J.A. 264-68 (IRAP's diversion of resources attributable in part to country ban); J.A. 277-81 (HIAS's diversion of resources and financial injuries attributable in part to country ban). These injuries provide an independent basis for standing. *McGowan v. State of Md.*, 366 U.S. 420, 430-31 (1961) (Establishment Clause standing based on financial injury).

is delivered by the government itself (not by an outside organization), making plaintiffs' standing even clearer. *See* J.A. 785-87; *Awad*, 670 F.3d at 1122–23.[9]

Third, while that is enough under well-settled Establishment Clause standing law, there is far more here. As the district court found, multiple plaintiffs and their families are directly in the crosshairs of, and further harmed by, the Order they are challenging. For example, John Doe #1's wife is subject to the ban, and remains abroad without a visa; Mr. Doe #1 is forced to "choose between my career and being with my wife." J.A. 305-06. John Doe #3 is in a similar position, and the "delays and uncertainty" caused by the Order "have placed extraordinary stress" on his marriage, leaving them feeling "desperate" and "torn apart." J.A. 309-10.[10]

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[9] The government asserts that the plaintiffs lack standing because "Section 2(c) itself does not expose plaintiffs personally to any religious display, message, or practice; it says nothing about religion." Br. 24; *see also* Stay Reply Br. 5 (arguing that the Order does not "expressly convey" a religious message). But a policy need not facially single out a particular faith for disfavor in order to violate the Establishment Clause. *See infra*.

[10] Thus, contrary to the government's suggestion, Br. 24, the plaintiffs are not like "any Muslim in this country." They have exceptionally close contact with the unconstitutional conduct at issue, and the Court therefore need not decide what the outer limits are on standing to challenge the Order. In any event, the fact that a large number of people may be injured by the Order is not a reason to deny particular plaintiffs standing. *See Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010) (cited in Stay Mot. at 14) (holding plaintiff had standing to challenge "In God We Trust" on U.S. currency even though the plaintiff's "encounters with the motto are common to all Americans").

3. There is nothing "speculative," "non-imminent," or unripe about the Establishment Clause claims in this case, even though the plaintiffs' relatives have not yet received visa denials. Br. 18-20. The Order immediately subjected the plaintiffs to Establishment Clause injuries that are not contingent on a visa denial, just as the school policy in *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000), allowing—but not requiring—prayers at football games immediately subjected students at the school to Establishment Clause injuries that were not contingent on a prayer actually being delivered at a football game. *Id.* at 314; *see also, e.g., Awad*, 670 F.3d at 1123.

The Supreme Court specifically rejected the argument that the *Santa Fe* challenge was premature because there was "no certainty that any of the statements or invocations [allowed by the policy] will be religious." *Santa Fe*, 530 U.S. at 313. The Court explained: "[T]he Constitution requires that we keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded, and that we guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion." *Id.* at 314 (citation and internal quotation marks omitted).[11]

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[11] Likewise, the doctrine of consular non-reviewability has no application here. *See infra* Part I.B.

B. The Plaintiffs' Statutory Claim Is Justiciable

1. The government argues that the plaintiffs cannot pursue their statutory claims because they cannot show that the Order has either delayed or caused the denial of the visas for which they are petitioning. But plaintiffs need not "await the consummation of threatened injury to obtain preventive relief." *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982) (internal quotation marks omitted). Where a party seeks prospective relief, the question is "whether any perceived threat to [the plaintiff] is sufficiently real and immediate to show an existing controversy." *Id.*; *see also Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1305 (4th Cir. 1992) (finding standing where plaintiffs "demonstrate a realistic danger of sustaining a direct injury" from challenged action) (internal quotation marks omitted).

Accordingly, the district court correctly concluded that plaintiffs have standing to challenge the Order under the INA. It found that at least three of the individual plaintiffs, all U.S. citizens or lawful permanent residents, face a substantial risk that Section 2(c) will result in their prolonged separation from loved ones for whom they have petitioned to immigrate to the United States. J.A. 780-84. These factual findings are supported by the record, J.A. 304-05, 308-09, 318-19, and are entitled to "substantial deference." *See Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 595 n.7 (4th Cir. 2013).

The government does not dispute that the plaintiffs identified by the district court—John Doe #1, Jane Doe #2, and John Doe #3—and the relatives for whom they are petitioning have submitted all required documentation. John Doe #3's wife has already completed her consular interview, so that the only remaining step in the process is issuance—or denial—of her visa. J.A. 308-09. John Doe #1's wife awaits a consular interview, which, based on current processing times, could be scheduled at any moment. J.A. 304-05. By halting visa issuance, the Order places these plaintiffs at "real and immediate" risk of having their visas denied based on the ban.[12] *Accord Hawai'i v. Trump*, No. 17-cv-50, 2017 WL 1011673, at *9 (D. Haw. Mar. 15, 2017) (finding standing in part because plaintiff's Syrian mother-in-law was awaiting consular visa interview and would be barred unless granted a waiver); *Sarsour v. Trump*, No. 17-cv-120, 2017 WL 1113305, at *5 (E.D. Va. Mar. 24, 2017) (standing based in part on Order's burden on plaintiffs' ability to reunite with relatives unable to secure visas).[13] If their visas were denied, plaintiffs and their relatives would be forced to re-apply and start the months-long process over again.

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[12] IRAP and HIAS also have a significant number of U.S.-based clients who are seeking to reunite with family members from the banned countries, including clients whose family members' travel was canceled and not rescheduled as a result of the original Order. *See* J.A. 273, 282-87 (HIAS); J.A. 263, 267-69 (IRAP). The organizations have third-party standing to vindicate the rights of these clients who will suffer prolonged separation from their family members due to Section 2(c), particularly where those family members face an ongoing risk of persecution. *See supra* n.6.

MESA has associational standing based on its members' injuries. J.A. 298-300. The government argues that MESA's annual conference would not be affected because it is slated to occur outside of the 90-day suspension. This disregards the reality that the ban will make it difficult for members from the banned countries, 48 of whom attended last year's conference, to secure visas in time to make arrangements to attend. For example, one Iranian MESA member firmly planned to attend the meeting, but she will likely be unable to do so if Section 2(c) goes into effect. J.A. 298. MESA also has many U.S.-based faculty members who will be unable to work with potential students outside the United States affected by the Order, harming these members' pedagogical and academic work. J.A. 298-300.

2. The fact that the government may issue a waiver in some cases does not deprive the plaintiffs of standing. The Order is clear: Because they come from one of the six listed countries, plaintiffs' loved ones are banned *unless* they apply for, and sustain the heavy burden to secure, a waiver. That would require each to

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[13] The cases cited by the government, unlike this case, involved multiple layers of contingent future events, implausible allegations of possible future harm, or both. *See Texas v. United States*, 523 U.S. 296, 300 (1998) (detailing litany of uncertain future events and observing that plaintiffs failed to point to any particular school district in which application of the challenged provision was foreseen or likely); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013) (finding that plaintiffs' claim that government could target them for surveillance at some point in the future was not sufficiently imminent or plausible where challenged statute specifically precluded monitoring of "U.S. persons" like plaintiffs); *Beck v. McDonald*, 848 F.3d 262, 274-75 (4th Cir. 2017) (holding that fear of harm from future identity theft due to stolen laptop was too speculative given lack of evidence that laptop was likely to result in identity theft); *Zhenli Ye Gon v. Holt*, 774 F.3d 207, 220-21 (4th Cir. 2014) (finding harm allegations to be similarly speculative and implausible).

establish "that denying entry during the suspension period would cause undue hardship," *and* "that his or her entry would not pose a threat to national security," *and* that the waiver "would be in the national interest." Mar. 6 Order § 3(c)(iv).

Furthermore, the additional delay caused by the waiver process is itself an injury, even if a waiver is ultimately granted. Although the government asserts that applicants can "seek a waiver during their visa interviews with consular officers," Br. 21, many individuals affected by Section 2(c), such as John Doe #3's wife, have *already* had their consular interview, and so would have to be re-interviewed for waiver purposes, which necessarily creates additional delay. J.A. 309; *see also* J.A. 269 (additional reasons waiver process will cause delay). Moreover, Department of State cables indicate that waivers may be granted only after conducting additional, vigorous examination of unspecified duration.[14]

Finally, even if the waiver process did not create additional delay, and even if every applicant eventually received a waiver, the plaintiffs would still be harmed by being confronted with a discriminatory barrier.[15] *Cf., e.g., Bostic v. Schaefer*,

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[14] *See* Michael D. Shear, *Trump Administration Orders Tougher Screening of Visa Applicants*, N.Y. Times (Mar. 23, 2017), https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html.

[15] The waiver process also would require IRAP to divert additional resources to draft and review otherwise unnecessary submissions to demonstrate that its clients meet the demanding waiver standard. J.A. 267.

760 F.3d 352, 372 (4th Cir. 2014) ("denial of equal treatment resulting from the imposition" of discriminatory barrier constitutes injury in fact) (internal quotation marks omitted); *Jackson v. Okaloosa Cty*., 21 F.3d 1531, 1541 (11th Cir. 1994) (claim against "additional hurdle . . . interposed with discriminatory purpose" is ripe "whether or not it might have been surmounted").

3. The government's contention that consular non-reviewability renders the statutory claim nonjusticiable is incorrect. The plaintiffs are not challenging any particular consular officer's decision; instead, they allege that Section 2(c) violates the INA. Statutory challenges to categorical policies are not barred by consular non-reviewability, even if the policies deprive individuals of visas. *See Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988) (finding doctrine inapplicable where visa applicants challenged the "authority of the Secretary of State" to impose a categorical policy); *Legal Assistance for Vietnamese Asylum Seekers v. Dept. of State*, 45 F.3d 469, 472 (D.D.C. 1995) (reaching merits of plaintiffs' claims that State Department violated regulations and the INA in refusing to process visa applications of certain Vietnamese immigrants).

II. The Plaintiffs Are Likely to Succeed on the Merits

A. The Order Violates the Establishment Clause

The Order is an attempt to realize the President's promised Muslim ban, and violates the Establishment Clause's fundamental guarantee of governmental neutrality. The district court correctly refused to ignore that reality.

1. The "touchstone" of the Establishment Clause "is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary*, 545 U.S. at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

This neutrality principle not only protects the right of individuals and religious groups to freely exercise their faith without governmental interference, but also "guard[s] against the civic divisiveness that follows when the government weighs in on one side of religious debate." *McCreary*, 545 U.S. at 876 (adding that "nothing does a better job of roiling society"); *see also Van Orden v. Perry*, 545 U.S. 677, 689 (2005). A law or policy need not expressly mention religion or draw religious lines to violate the neutrality principle. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994) (holding facially neutral law violated the Establishment Clause).

2. The district court applied settled Establishment Clause law in its analysis, explaining that "to withstand an Establishment Clause challenge . . . an act must have a secular purpose." J.A. 794 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).)). That "analysis does not end with the text of the statute at issue." *Kiryas Joel*, 512 U.S. at 699 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993)); *accord Washington*, 847 F.3d at 1167. And even if there is also a genuine secular purpose for the action, "[i]f a religious purpose for the government action is the predominant or primary purpose, and the secular purpose is 'secondary,' the purpose test has not been satisfied." J.A. 795 (quoting *McCreary*, 545 U.S. at 864). Finally, "[i]n determining purpose, a court acts as an 'objective'" or "'reasonable'" observer who considers every "'readily discoverable fact.'" J.A. 795, 802 (quoting *McCreary*, 545 U.S. at 862, 866).[16]

[16] The Order is also invalid under *Lemon*'s second prong, which asks "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval" of religion. *Mellen v. Bunting*, 327 F.3d 355, 374 (4th Cir. 2003) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985)). The Order's targeting of Muslims, the exceedingly thin non-discriminatory justifications provided by the government, the history of the enactments, and the explicit anti-Muslim statements linked to the Order together convey a strong message of disapproval of Islam.

For similar reasons, the Order is invalid under *Larson*, because it is designed "to burden" a "selected religious denomination," 456 U.S. at 255, and the Order fails strict scrutiny, as the government concedes through its silence.

The district court carefully considered the evidence, including "public statements made by President Trump and his advisors, before his election, before the issuance of the First Executive Order, and since the decision to issue the Second Executive Order." J.A. 795. The district court's findings of fact may only be reversed if they are clearly erroneous. *See Lynch v. Donnelly*, 465 U.S. 668, 681 (1984); *Glassroth v. Moore*, 335 F.3d 1282, 1296-97 (11th Cir. 2003)).

The district court's factual findings were amply supported by the undisputed record evidence discussed more fully, *supra*, in the Statement of the Case. The government has not even tried to carry its burden to overcome those findings. In particular:

- The district court found that President Trump had made "numerous statements . . . expressing an intent to issue a Muslim ban or otherwise conveying anti-Muslim sentiments." J.A. 796; *see also id.* at 796-97 (cataloging statements, including post-election statements). These include

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The Order also violates equal protection. "[T]he Religion Clauses . . . and the Equal Protection Clause as applied to religion . . . all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Hassan v. City of New York*, 804 F.3d 277, 290 n.2 (3d Cir. 2015) (quoting *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in the judgment) (alterations in original, internal quotation marks omitted)). The district court did not address the equal protection claim because it found a likelihood of success on the Establishment Clause claim. J.A. 807.

the statement that President Trump continues to publish on his website today.

- The district court found that the record "includes specific statements directly establishing" that the President "intended to effectuate a partial Muslim ban by banning entry by citizens of specific predominantly Muslim countries." J.A. 797-98 (describing statements, including post-election statements).[17]

- The district court found that, despite the changes from the first version of the Order to the second, there is "a convincing case that the purpose of the Second Executive Order remains the realization of the long-envisioned Muslim ban." J.A. 799-800 (discussing statements, including post-election statements, and considering the terms of the Order itself).

- Finally, the district court found it "likely that the primary purpose of the travel ban was grounded in religion, and even if the Second Executive Order has a national security purpose, it is likely that its primary purpose remains the effectuation of the proposed Muslim ban." J.A. 806; *see id.* at 804-06 (examining history of enactments and record evidence).

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[17] It was not necessary for the court to find that *all* or *only* Muslim individuals were affected; that the President selected overwhelmingly Muslim countries was extremely probative. *See Aziz*, 2017 WL 580855, at *9 ("It is a discriminatory purpose that matters, no matter how inefficient the execution.").

The district court's detailed findings, supported by a voluminous record, are correct.

B. The Government's Attempts to Limit Establishment Clause Review Fail

The government does not dispute the district court's conclusion that a reasonable observer, who considered all the "openly available data" in the record, *McCreary*, 545 U.S. at 863, would likely conclude that Section 2(c)'s primary purpose is to exclude Muslims. The government also does not contend such a purpose would be constitutional. Instead, the government urges the Court to restrict the reasonable observer's perceptive faculties in various ways. None of the government's proposed limitations has any basis in law, and all should be rejected.

Adopting the government's positions would eviscerate the Establishment Clause. On its theory, if a politician ran a campaign built on an explicit promise to establish Christianity as the national religion, her speeches, literature, and website would have absolutely *no* bearing on the evaluation of *any* steps the candidate took once in office—no matter how specific and consistent her campaign promises, how brief the period of time between her assumption of office and consummation of those promises, how clear her reaffirmation of prior plans after the election or inauguration, and how disproportionate the impact of her actions on non-Christian religions. Likewise, here, the government's arguments would mean that even if the President repeatedly announced that "the Executive Order's sole purpose is to harm Muslims," it could survive Establishment Clause scrutiny. All that would be required would be to ensure that the Order itself never mentioned that purpose. To defer to the President's hand-picked statement of purpose while ignoring what every reasonable observer knows would risk the kind of blind deference that led to *Korematsu v. United States*, 323 U.S. 214 (1944).

1. The government maintains that the Court should review only whether the Order is "facially legitimate and bona fide." Br. 35 (citing *Kleindienst v. Mandel*, 408 U.S. at 770)). But the Supreme Court has never applied that standard to a claim under the Establishment Clause—and it would be particularly inappropriate to do so in this case.

The anti-Muslim message of the Order, as explained above, violates the core Establishment Clause command that the government may not disfavor or condemn a particular religion. *See Catholic League*, 624 F.3d at 1053. This Establishment Clause injury does not depend on whether a particular visa or set of visas is actually granted or denied. This case is, therefore, distinct from those where the *Mandel* standard was applied. *See Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment) (challenge to denial of spouse's visa); *Fiallo v. Bell*, 430 U.S. 787, 798-99 (1977) (equal protection challenge to categories of parent-child immigrant visas); *Johnson v. Whitehead*, 647 F.3d 120, 127 (4th Cir. 2011) (same); *Mandel*, 408 U.S. at 762 (challenge to denial of nonimmigrant visitor visa by individuals seeking to "hear, speak, and debate" in person with visa applicant). In each of those cases, the U.S. plaintiff's individual rights were "implicated," *Mandel*, 408 U.S. at 765, only to the extent that the requested visas were actually denied. In this case, by contrast, the Establishment Clause violation occurs apart from the denial of any visa.

This distinction reflects the role of the Establishment Clause in our constitutional system. The Clause is not only a safeguard against individual religious discrimination; it is a structural restriction on the authority of the government to endorse or condemn any religion, imposed by the Founders in part to avert the religious divisiveness that threatens a cohesive democratic society. *See Engle v. Vitale*, 370 U.S. 421, 430 (1962) (Establishment Clause "is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not"). Thus, this case is more akin to *INS v. Chadha*, 462 U.S. 919 (1983), which involved structural separation-of-powers principles, than the individual-rights visa challenges in which *Mandel* has been applied. In *Chadha*, the Court reviewed *without deference* a noncitizen's challenge to the denial of discretionary immigration relief, and upheld the challenge on separation of powers grounds. *Id. at* 940-41 (review appropriate despite Congress' so-called "plenary authority" over immigration, because "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power"); *see also Bond v. United States*, 564 U.S. 211, 223 (2011) ("If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object."); *cf. Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 426 (8th Cir. 2007) (declining to apply more deferential standard of review to prisoners' Establishment Clause claims).

Applying deferential review would be particularly inappropriate in a case such as this one. First, the "facially legitimate and bona fide" standard is most typically applied, as the district court observed, J.A. 806-07, to individual visa denials, *see, e.g.*, *Din*, 135 S. Ct. 2128, that historically have been accorded more limited review. Second, *Fiallo* cannot support applying that standard here.[18] That case involved a challenge to the congressional line-drawing on the face of the statute itself. There was no allegation that an impermissible purpose or motivation lay behind the statute's definition of qualifying parent-child relationships, and thus the Court had no occasion to address how such evidence would have been treated. Moreover, the *Fiallo* Court concluded that line-drawing about family ties—a long-standing aspect of immigration law—was a "policy question[] exclusively entrusted to the political branches." 430 U.S. at 798. By contrast, here, the government has not argued that the President *could* constitutionally bar Muslims—or that condemning certain religions is a policy decision for the political branches.[19]

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[18] *Rajah v. Mukasey*, 544 F.3d 427, 439 (2d Cir. 2008) (cited in Br. 36-37), supports the plaintiffs, not the government. In that case, the Second Circuit rejected a religious discrimination (not Establishment Clause) challenge to the National Security Entry-Exit Registration System because the plaintiffs had offered *no* evidence of "improper animus toward Muslims" beyond the fact that most of the countries subject to the system were predominantly Muslim. Here, the district court made detailed findings based on voluminous evidence of improper purpose. J.A. 777-779, 794-806.

Indeed, if the Order had simply declared that "Muslims are not welcome in the United States," there would be little question that ordinary Establishment Clause principles would govern. *See, e.g.*, *Moss*, 689 F.3d at 607. The Order's purpose to exclude Muslims conveys the exact same message—but with the added consequence of actually denying visas as well—and thus calls for the same analysis.

2. Even if the *Mandel* standard did apply, the result would be the same, because the Court would still need to examine evidence of bad faith—the same

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[19] The closest the government comes to defending an explicit Muslim ban is the suggestion that "Establishment Clause precedents . . . have no proper application" to immigration or national security. Br. 42. No court has so held, of course, and never before has a President used the immigration power to target a religion for disfavor. Nothing in the Constitution or the case law supports the radical proposition that the immigration or national security power encompasses the authority to condemn and disadvantage a particular religion, if that is what the government is suggesting.

evidence that proves improper purpose under the Establishment Clause. *See Aziz*, 2017 WL 580855, at *8 ((when proffered reason "has been given in bad faith, it is not bona fide") (quotation marks omitted). As Justice Kennedy explained in *Din*, courts should examine "additional factual details beyond" the face of the decision when there is "an affirmative showing of bad faith." *Din*, 135 S. Ct. at 2141; *accord Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009); *Adams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990). Failing to do so would erase the "bona fide" half of the standard altogether.

The government makes virtually no attempt to grapple with *Mandel*'s requirement that the facially legitimate reason must also be bona fide. The government simply asserts that the President's "accommodation of courts' concerns" in revising the Order demonstrated good faith. Br. 39. But the fact that the President revised his Order to better defend it in court while still pursuing the same policy goal simply demonstrates that he is committed to carrying out his purpose. As he explained: "I wasn't thrilled, but the lawyers all said, oh, let's tailor it. This is a watered down version of the first one." *Supra* n.1. *Compare* Br. 3, 38-39, 43 (relying on post-litigation revisions to achieve facial neutrality), *with McCreary*, 545 U.S. at 871-73 & n.22 (holding that post-litigation revisions to achieve facial neutrality did not diminish improper purpose); *Santa Fe*, 530 U.S. at 309 (same); J.A. 805 (same).

3. The government then takes the "alternative tack of trivializing the enquiry into" the Order's purpose. *McCreary*, 545 U.S. at 863. It argues that courts should only consider "official pronouncements," which, in the government's view, excludes every piece of evidence in this case other than the text of the Order and a letter signed by the Attorney General and Secretary of Homeland Security on the same day as the Order itself. Br. 46-49.

This restriction is invented from whole cloth. The Supreme Court has never imposed such a limitation. And as a basic principle, it makes no sense to claim that the only probative evidence of an actor's purpose is what appears in formal written statements carefully vetted by his lawyers.

To the contrary, the Supreme Court has made clear that a reasonable observer considers all "readily discoverable fact[s]" and does not "ignore perfectly probative evidence" of a governmental actor's purpose. *McCreary*, 545 U.S. at 862, 866; *see also Santa Fe*, 530 U.S. at 315 (admonishing courts not "to turn a blind eye to the context in which [a] policy arose"). In *McCreary* itself, the Court explained that the "reasonable observer" would consider public statements by "the county executive" and "his pastor" in judging the legislature's purpose. 545 U.S. at 859, 869. In *Epperson*, the Court looked to letters to the editor and newspaper advertisements used to secure adoption of Arkansas's anti-evolution statute to conclude that it was "clear that fundamentalist sectarian conviction was and is the law's reason for existence." 393 U.S. at 107-08 & n.16; *see also Green v. Haskell County*, 568 F.3d 784, 801-02 (10th Cir. 2009) (considering statements to the press in determining purpose under the Establishment Clause); *cf. Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985) (considering testimony of expert historians to establish discriminatory purpose).

What sets this case apart is not that the district court considered the probative evidence before it, but that such direct evidence exists at all. Elected officials "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate." *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). But when they do, as President Trump has done here, of course a reasonable observer would consider the decision-maker's own explicit public statements of purpose.

In arguing otherwise, the government ignores one of the important reasons for *Lemon*'s purpose prong: The serious problems caused by the "*perception* of government establishment of religion." *Santa Fe*, 530 U.S. at 314 (emphasis added). An objectively observable purpose to condemn one religion "sends the . . . message" that its adherents "'are outsiders, not full members of the political community.'" *McCreary*, 545 U.S. at 860 (quoting *Santa Fe* 530 U.S. at 309); *see id.* at 866 n.14 ("an *ostensible* indication of a purpose to promote a particular faith" will cause "viewers to understand the government is taking sides") (emphasis added). The President's public statements, confirmed by his closest advisors, send that message loud and clear. There is nothing "veiled" about those pronouncements, Br. 47, or about the President's own website, which has continuously called for "preventing Muslim immigration" since his inauguration, J.A. 346, 777, 779. As the district court noted, "Defendants do not directly contest that this record of public statements reveals a religious motivation for the travel ban." J.A. 801.

4. The government alternatively contends that the district court should at least have ignored what President Trump said about the ban before the election. Br. 49-53. At the outset, it bears repeating that the government is wrong that "[v]irtually all" the statements the district court considered were made before the President took office. Br. 51. The government ignores the President's website, available and updated to this day, J.A. 346, 779, his statement at signing, J.A. 403, his advisor's post-signing explanation confirming that the ban implements the President's religious purpose, J.A. 508-09, his comments linking the two Orders, Dkt. No. 105-1, Ex. 3 at 4; J.A. 379, 580, the January 27 Order's Christian preference, Jan. 27 Order § 5(b), (e); J.A. 462, and the anti-Muslim stereotypes in both versions' text, Jan. 27 Order §§ 1, 10(a)(iii), Mar. 6 Order § 11(a)(3) (discussing "honor killings"); J.A. 598; 681. President-elect Trump also publicly confirmed his plans to ban Muslims after the election, just weeks before issuing the

January 27 Order. J.A. 506. These post-election statements are more than sufficient to demonstrate the ban's improper purpose.

In any event, "[s]imply because a decisionmaker made the statements during a campaign does not wipe them from the 'reasonable memory' of a 'reasonable observer.'" J.A. 802 (quoting *McCreary*, 545 U.S. at 866); *see also Epperson*, 393 U.S. at 108 & n.16 (relying on an advertisement "typical of the public appeal which was used in the campaign to secure adoption" of a challenged initiative, as well as letters to the editor written in support of it). That is the lesson of *Glassroth*, which relied on campaign statements. 335 F.3d at 1284-85, 1297. The government highlights that the official in that case linked his campaign pledge to government action at the "unveiling" of the promised monument. Br. 52. But President Trump did much the same thing. J.A. 403, 778, 797 (reading title of Order and announcing, "We all know what that means").[20]

Contrary to the alarmist rhetoric, *see* Br. 49-50, 52 (raising the specter of "'open season on anything a politician or his staff may have said'" and chilling campaign speech), this case does not involve, and the Court need not address, a

[20] The government's contention that Section 2(c) "bears no resemblance" to the promised Muslim ban, Br. 52-53, is unconvincing on its own terms, and ignores that Section 2(c) bears a perfect resemblance to the nationality ban the President promised as the *means* for achieving his Muslim ban. J.A. 403, 480-81, 508; *accord* J.A. 806.

passing comment on the campaign trail, a general invocation of religious faith, or typical campaign puffery. This is a "unique case." J.A. 804. The campaign promises here were specific, repeated, confirmed after the election, immediately enacted, and confirmed again after the promulgation of the January 27 and March 6 Orders.

Thus, this case presents no difficult questions about the relative weight to assign to different speakers, the timing of their statements, and the generality of their speech. Br. 50-51. Even if it did, those questions attach to all purpose inquiries. And the Supreme Court has explained that analyzing discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *accord McCreary*, 545 U.S. at 867 ("[U]nder the Establishment Clause, detail is key."); *Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one . . . ."). It is precisely that sensitivity that has made this Court "particularly hesitant to overturn the conclusions and findings of the district court as they relate to the design, motive and intent with which individuals act." *Smith*, 682 F.2d at 1064.

C. The Order Violates the Immigration and Nationality Act

The INA does not authorize the President to enact Section 2(c). Section 212(f) of the INA, 8 U.S.C. § 1182(f), on which the government relies, only allows the President to suspend the entry of aliens if letting them in would be "detrimental to the interests of the United States." It says nothing of religion, has never before been invoked to justify religiously discriminatory exclusion, and cannot be read to authorize religious discrimination. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (explaining that "[w]e have read significant limitations into . . . immigration statutes in order to avoid their constitutional invalidation" and describing constitutional avoidance as a "'cardinal principle'" of statutory interpretation). In subsequent statutes, moreover, Congress has shown particular concern for religious freedom, further underlining that the INA should not be presumed to authorize a discriminatory ban. *See, e.g.*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq*. Contrary to the government's view, the President is thus far from the height of his powers in this case. Br. 40 (citing *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015)).

The Order also violates the INA's anti-discrimination provision. Section 202(a)(1)(A) of the INA, 8 U.S.C. § 1152(a)(1)(A), provides, with limited and immaterial exceptions, that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of" his "nationality." Passed in 1965, at the height of the civil rights movement, § 1152(a)(1)(A) was an explicit repudiation of nationality discrimination in immigration policy. *See Olsen v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997) ("The legislative history surrounding the 1965 Act is replete with the bold anti-discriminatory principles of the Civil Rights Era."). Courts have interpreted this prohibition broadly. *See, e.g.*, *LAVAS*, 45 F.3d at 473 (striking down a "nationality-based regulation" under § 1152(a)(1)(A) because "Congress has unambiguously directed that no nationality-based discrimination shall occur").[21]

The government agrees that Section 2(c) suspends visa issuance to nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen. J.A. 729-30. And the Order itself explicitly acknowledges, multiple times, that it is regulating the visa-issuance process. Mar. 6 Order §§ 1(a), 1(g), 3(c). By denying visas to "certain groups solely on the basis of their nationality," *Olsen*, 990 F. Supp. at 38, the Order does precisely what § 1152(a)(1)(A) prohibits.

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[21] The former chief of the Legal Advisory Opinion section of the Visa Office described the Order as "unprecedented": "During my 30-year career at the U.S. Department of State, I was involved in numerous 212(f) determinations. All were supported by carefully drafted memos and cited specific evidence of detriment to U.S. interests. The Trump travel bans do not." Jeffrey Gorsky, *An Alternative Legal Argument Against Trump's Travel Ban*, Apr. 10, 2017, https://www.lexisnexis.com/legalnewsroom/immigration/b/outsidenews/archive/2017/04/11/jeffrey-gorsky-an-alternative-legal-argument-against-trump-39-s-travel-ban.aspx?Redirected=true#sthash.OogsL6s5.dpuf.10; *see also* Kate M. Manuel, *Executive Authority to Exclude Aliens: In Brief*, Congressional Research Service, Jan. 23, 2017 (listing Presidential actions pursuant to § 1182(f)), J.A. 116-20.

The government contends, however, that the Order merely suspends the *entry* of certain nationals, with the suspension of *visa issuance* simply a secondary consequence. But that ignores the way the Order actually works. Under the Order, nationals of banned countries who hold valid visas *can* enter the country, regardless of when their visas were issued. *See* Mar. 6 Order § 3(a)(iii) (allowing entry with visa issued before effective date); *id.* § 3(c) (allowing entry with visa issued after effective date). Suspending visa issuance is thus the fulcrum of the ban. Section 2(c) is therefore squarely governed by the INA provisions and protections governing visa issuance. J.A. 790; *see also Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) ("[A]ll parts of a statute, if at all possible, are to be given effect.").[22] And if there were any conflict between § 1182(f) and § 1185(a), on the one hand, and § 1152(a)(1)(A), on the other, § 1152(a)(1)(A) would control. It is later-enacted and more specific. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 159 n.2 (1976) ("[T]he more specific legislation will usually take precedence over the more general . . . .").

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[22] Although the district court held only that the Order violates § 1152(a)(1)(A) with respect to immigrant visas, this Court could also affirm the preliminary injunction on statutory grounds by holding that § 1152(a)(1)(A) bans discrimination with respect to nonimmigrant visas. *See Olsen*, 990 F. Supp. at 38-39) (applying § 1152(a)(1)(A) to the issuance of "nonimmigrant visa[s]").

The district court held that § 1152(a)(1)(A) prohibits Section 2(c)'s suspension of visa issuance, but § 1182(f) allows the government to deny *entry* to those same individuals. While the plaintiffs disagree with the district court's broad view of § 1182(f) authority, that view does not render the § 1182(f) ruling "senseless[]." Br. 16. Even if the government could deny entry during the 90-day period, it is far from pointless to require normal visa issuance to continue. Applicants denied visas based on Section 2(c) would be forced to reapply and start the lengthy process over again. By contrast, continuing normal visa processing would allow individuals to secure visas (typically with validity that outlasts the 90 days) and make arrangements to travel once they would be permitted entry.

If § 1182(f) allowed the President to override § 1152(a)(1)(A), as the government suggests, the President could override *any* of the INA's visa criteria or inadmissibility grounds. In fact, that is exactly what the Order purports to do: It erases the normal immigration rules as to the six countries, and it replaces them with categories of the President's choosing. *See* Order § 3(c)(i)-(ix) (establishing which categories of people may be issued visas). That is not what § 1182(f) allows. *Cf. Clinton v. City of New York*, 524 U.S. 417, 443 (1998) (holding that Congress may not give the President "the power to cancel portions of a duly enacted statute").

The government's reliance on 8 U.S.C. § 1152(a)(1)(B) is similarly misplaced. The provision only allows the Secretary of State to vary the "locations" and "procedures for the processing" of visa applications. As the district court correctly concluded, § 1152(a)(1)(B) "applies to the Secretary of State," not the President. J.A. 792. Moreover, the Order does not regulate locations or procedures, but renders nationals of the banned countries substantively inadmissible. Finally, the fact that Section 2(c) is nominally temporary does not somehow transform its substantive ban into a matter of procedure. J.A. 792; *cf.* Mar. 6 Order § 2(e), (f) (contemplating extension and expansion of ban).

III. The Balance of Harms and Public Interest Favor the Entry of a Preliminary Injunction

The balance of harms and the public interest weigh strongly in favor of upholding the preliminary injunction. As the district court correctly found, the individual and the organizational plaintiffs face immediate and irreparable injury. J.A. 807-08, 810. Absent the preliminary injunction, individual plaintiffs will be separated from their family members, including individuals who face an ongoing risk of persecution, and will also suffer injuries under the Establishment Clause. *See supra* Parts I.A, I.B. "When government chooses sides among religions, the 'inevitable result' is 'hatred, disrespect, and even contempt' from those who adhere to different beliefs." J.A. 809 (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

The government argues that these irreparable harms are outweighed by its own abstract institutional injuries—a position that finds scant support in the case law. In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers), Justice Rehnquist stated that "[i]t also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *See also Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd.*). The Justices in these two cases were confronted with executive actions *commanded* by statute. Here, the government does not suggest that there is any statutory command; indeed, the Order is *precluded* by statute. Moreover, in both cases, the Justices identified concrete injuries to the government, and not merely the possibility of abstract injury. *See New Motor Vehicle Bd.*, 434 U.S. at 1351 (injunction prevented state from evaluating the propriety of motor vehicle dealer relocations); *Maryland v. King*, 567 U.S. 1301 (injunction prevented state from removing violent felons from the population). And in any case, "when the law that voters wish to enact is likely unconstitutional, their interests do not outweigh [a plaintiff's] in having his constitutional rights protected." *Awad*, 670 F.3d at 1131.

The government's invocation of national security considerations does not alter this balance. As the district court correctly found, the government has "not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country ban, a measure that has not been deemed necessary at any other time in recent history." J.A. 809. Nor has the government pointed to *any* change in circumstances that might have altered the status quo or presented new dangers. The Ninth Circuit reached the same conclusion on a similar record in *Washington*, 847 F.3d at 1168, finding that the government did not face irreparable injury where it had "done little more than reiterate" its general interest in fighting terrorism. The court explained that "the Government's 'authority and expertise in [national security] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals.'" *Id.* at 1163 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010)).

Enforcement of an unconstitutional government directive is "always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). The government has failed to show how its interest in enforcing the executive order, especially absent any proffered evidence of a threat, outweighs this interest and the real, irreparable harms that Plaintiffs, their members and clients, and many others around the country face if Section 2(c) is allowed to go into effect. *See* Amicus Br. of Virginia, Maryland, et al., Dkt. No. 58-1; Amicus Br. of Chicago et al., Dkt. No. 60-1; Amicus Br. of Colleges and Universities, Dkt.

No. 52-1; Amicus Br. of American-Arab Anti-Discrimination Committee, Dkt. No. 72-1.

IV. The Preliminary Injunction Is Appropriate in Scope

The district court was well within its discretion to enjoin Section 2(c) nationwide. *See Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002) ("When a district court grants an injunction, the scope of such relief rests within its sound discretion."). Any other relief would have been inadequate. The Muslim plaintiffs are immigrants who are condemned by the Order's very existence. The organizational plaintiffs have members, clients, and operations scattered across the country. The district court correctly concluded that those harms merited nationwide relief.

The government argues that instead of enjoining Section 2(c) on its face, the district court should have focused on its possible applications. Br. 55. But the Supreme Court has expressly held that Establishment Clause challenges under *Lemon*'s purpose prong may proceed as facial challenges. *Santa Fe*, 530 U.S. at 314 ("Our Establishment Clause cases involving facial challenges [] have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose."); *see also Awad*, 670 F.3d at 1124-25. Simply put, government action motivated by religious animus is unconstitutional in all its applications.

For similar reasons, a more limited injunction would not protect plaintiffs from the Order's condemnation of their faith. Allowing the government to enforce Section 2(c) against others in the plaintiffs' communities would barely lessen the message that plaintiffs are "outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309 (quoting *Lynch*, 465 U.S. at 688); *ACLU of Ky. v. McCreary Cty.*, 607 F.3d 439, 449 (6th Cir. 2010) (explaining that Establishment Clause plaintiffs would "suffer continuing irreparable injury so long as the display [of the Ten Commandments] remains on the walls of the county courthouses"). A nationwide injunction is thus "necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994); *see also Decker v. O'Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (affirming nationwide injunction to remedy a facial Establishment Clause violation).

The organizational plaintiffs, who have clients, members, and operations across the country, also would not be adequately protected by a more limited injunction. *See Richmond Tenants Org, Inc. v. Kemp.*, 956 F.2d 1300, 1308-09 (4th Cir. 1992) (rejecting challenge to scope of nationwide injunction for plaintiffs who were located across the country).[23] Moreover, as many circuits have

[23] By contrast, in *Lewis v. Casey*, 518 U.S. 343 (1996) (cited at Br. 56), the Court held that plaintiffs who "demonstrate harm from one particular inadequacy" cannot thereby challenge *other* "inadequacies" to which they are not subject. *Id.* at

recognized, "a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy."[24] *Washington*, 847 F.3d at 1166-67; *see also Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015 (affirming nationwide preliminary injunction), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). For these reasons, the district court did not abuse its discretion in ordering nationwide relief.

CONCLUSION

The Court should affirm the preliminary injunction.

Dated: April 14, 2017

Respectfully submitted,

/s/ Omar Jadwat

Omar C. Jadwat
Lee Gelernt
Hina Shamsi
Hugh Handeyside
Sarah L. Mehta
Spencer E. Amdur
AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Justin B. Cox
NATIONAL IMMIGRATION LAW CENTER
1989 College Ave. NE
Atlanta, GA 30317
Tel: (678) 279-5441
Fax: (213) 639-3911
cox@nilc.org

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357. The Court affirmed that "a systemwide impact" would call for "a systemwide remedy." *Id.* at 359 (quotation marks omitted).

[24] The government also relies on *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992), to suggest that this Court lacks jurisdiction to enjoin an act of the President. Yet in *Franklin*, the injunction could have its full effect without directly acting on the President, so the Court declined to reach the question of whether including the President in the injunction was appropriate. The same is true here.

Karen C. Tumlin
Nicholas Espíritu
Melissa S. Keaney
Esther Sung
Marielena Hincapié
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 1600
Los Angeles, CA 90010
Tel: (213) 639-3900
Fax: (213) 639-3911
tumlin@nilc.org

125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
Fax: (212) 549-2654
ojadwat@aclu.org
Cecillia D. Wang
Cody H. Wofsy
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org

David Cole
Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, DC 20005
Tel: (202) 675-2330
Fax: (202) 457-0805
dcole@aclu.org

David Rocah
Deborah A. Jeon
Sonia Kumar
Nicholas Taichi Steiner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Tel: (410) 889-8555
Fax: (410) 366-7838
rocah@aclu-md.org

Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 32(a)(7)(B). The brief contains 12,964 words, excluding the parts of the brief described in Rule 32(f).

/s/ Omar C. Jadwat
Omar. C. Jadwat

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system, except for the following, who will be served by first class mail on April 15, 2017:

Victor Williams
5209 Baltimore Ave
Bethesda, MD 20816

/s/ Omar C. Jadwat
Omar C. Jadwat